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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KELVIN LEYMON REDD, JR. et al.,

Defendants and Appellants.

D074716

(Super. Ct. No. SWF1303480)

APPEAL from a judgment of the Superior Court of Riverside County, Angel Bermudez and Stephen J. Gallon, Judges. Affirmed and remanded with directions.

J. Courtney Shevelson, under appointment by the Court of Appeal, for Defendant and Appellant Kelvin Leymon Redd, Jr.

Ronda G. Norris, under appointment by the Court of Appeal, for Defendant and Appellant Tiaki Alfred James Mosley.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Kelvin Leymon Redd, Jr. and Tiaki Alfred James Mosley targeted and robbed three people and murdered another person. They contend on appeal that the trial court erred in failing to suppress statements they made to the police, arguing that the statements were the result of unlawful arrests made without probable cause. Redd also seeks remand for the trial court to exercise its discretion on the firearm enhancements that were found true. We remand Redd's case to the trial court and direct it to exercise its discretion on Redd's firearm sentencing enhancements. In all other respects, we affirm both convictions.

BACKGROUND

Counts 1 and 2 - Burglary and Theft¹

Overnight from November 8 through November 9, 2013, a home in Hemet was broken into and a .25 caliber semiautomatic pistol, ammunition, a safe and loose change were taken.

Count 3 - Robbery of James G.

On November 10, 2013, James G. drove his 87-year-old mother, Dorothy G., to her home in San Jacinto after going out to dinner with her near the Hemet Valley Mall. Dorothy G.'s car had handicap plates on it. A man came up behind James G. as he was helping his mother out of the car and said, "Don't move." James G. turned and saw that the man was pointing a pistol at him. The robber demanded James G.'s wallet. James G. gave the robber a \$100 bill instead. The robber demanded the rest of James G.'s money,

¹ Only Redd was charged with burglary and grand theft.

turned the gun away from James G. and fired into the garage, leaving a .25 caliber shell casing. A second, shorter robber walked up at this time. James G. gave the robbers the rest of his money, about \$360. The robbers left. James G. and Dorothy G. saw a small black car drive away. The car had shiny rims or hubcaps. James G. called the police, reported the robbery, and gave a description of the men and the car.

Count 4 - Robbery of William B.

On November 15, 2013, 77-year-old William B. picked up food at a restaurant near the Hemet Valley Mall. He drove back to his home in Hemet. He had handicap plates on his car. A man with a handgun came up to him as he was getting out of his car and demanded his wallet. William B. gave most of his money to the robber but asked if he could keep his wallet. A second, shorter robber appeared and took the wallet. The robbers ran to a small, dark, four-door sedan without hubcaps and drove off. William B.'s wallet was found at the Hemet Valley Mall and returned to him within an hour.

Count 5 - Robbery of B.C.

On the night of November 15, 2013, 74-year-old B.C. stopped at the Hemet Valley Mall before driving to his home in Hemet. His car had a handicap card displayed. He noticed a smaller, dark-colored car that drove down his block, made a U-turn and drove back past his driveway as he was parking his car. When B.C. opened his car door, a man pressed a pistol against B.C.'s head and told B.C. to give him his wallet or he would kill him. B.C. gave him a bag that had about \$1,500 in it. The robber took B.C.'s heavy, 18-karat gold bracelet as well and ran off. Surveillance videos from neighbors showed a

dark car following B.C.'s car as he drove up to his house, a person getting out of the car, walking toward B.C.'s home, then quickly walking back to the car.

Count 6 - Murder of Victor P.

On November 16, 2013, 77-year-old Victor P. and 69-year-old Carmen L. drove to a nearby grocery store and back to their home in Hemet. Surveillance video from the grocery store showed a small dark car followed them as they drove out of the parking lot. Victor P. and Carmen L. drove to their garage in the alley behind their house. Carmen L. got out of the car first and went into the house. She heard the sound of a car, a "pop" in the garage, and a car driving away. She went to the garage and saw Victor P. lying on the ground in the garage. He told Carmen L. that he was hurt. Carmen L., a Spanish speaker, used a verb tense that implied Victor P. said "they" hurt him. She called 911. The police and an ambulance arrived quickly and took Victor P. to the hospital.

Victor P. died from a single gunshot that went through his heart. Police found in his garage a .25 caliber bullet casing that matched the casing recovered from James G.'s garage.

Interviews with Defendants

Redd and Mosley were arrested on November 19, 2013, and were interviewed separately by the police after being advised of their *Miranda*² rights. Both denied being

² *Miranda v. Arizona* (1966) 384 U.S. 436.

involved at first, then Redd told the officers a man known as "Face"³ was in the car with them and came up with the plan to follow Victor P. from the grocery store and rob him. Redd said he and Mosley stayed in the car while Dominick D. confronted and shot Victor P.

The police then left Redd and Mosley alone together in the same room. Redd told Mosley to blame Dominick D. for committing the crimes, and Mosley agreed. Mosely and Redd were each interviewed separately again. Mosley initially said Dominick D. killed Victor P. while Mosley and Redd sat in the car further down the alley. He eventually changed his story. He said Redd planned all the robberies and he, Mosley, just followed Redd's instructions. He said he was in the car when Redd killed Victor P. and he drove Redd away.

Redd identified a picture of Dominick D. when he was interviewed a second time and said, again, that Dominick D. was the one who killed the victim. Eventually, Redd told the officers that he shot Victor P. accidentally. Redd said he demanded Victor P.'s wallet. Victor P. grabbed Redd's hand and the gun went off. Redd also told the officers that he and Mosley broke into John C.'s house and stole his gun. He admitted that he had robbed James G. with a gun and shot a bullet into the garage wall, robbed William B. and threw his wallet away in the Hemet Valley Mall, and robbed B.C. Redd said that Mosley was the mastermind and he just did what Mosley told him to do.

³ Face's name was Dominick D. He will be referred to by this name, although Redd and Mosley called him only Face.

In a later interview Redd reverted to his original story. He admitted he participated in the armed robberies but insisted he was not present at, and did not participate in, the murder.

Conviction and Sentencing

A jury found Redd guilty of burglary (Pen. Code,⁴ § 459); theft of a firearm (§ 487, subd. (d)(2)); three counts of robbery (§ 211); and first degree murder (§ 187, subd. (a)). It found true allegations that Redd had personally discharged a firearm with respect to the James G. robbery (§§ 12022.53, subd. (c), & 1192.7, subd. (c)(8)), and that he personally used a firearm in connection with the other two robberies (§§ 12022.53, subd. (b), & 1192.7, subd. (c)(8)). The jury found true the special circumstance that the murder of Victor P. was committed while Redd was committing or attempting to commit a robbery. (§ 190.2, subd. (a)(17).) The jury did not find true the firearm allegation in connection with the murder.

A separate jury found Mosley guilty of three counts of robbery (§ 211) and one count of first degree murder (§ 187, subd. (a)). It found not true the special circumstance of murder during the commission of a robbery.

The trial court sentenced Redd to a total term of 35 years plus a term of life in prison without the possibility of parole. It sentenced Mosley to a term of seven years plus 25 years to life.

⁴ Further statutory references are to the Penal Code unless otherwise noted.

DISCUSSION

1. *Motion to Suppress Evidence*

Redd and Mosley both filed section 1538.5 motions to suppress the statements they made to the police after they were arrested, claiming there was no probable cause to arrest them. The trial court held an extensive evidentiary hearing with testimony from six officers from the Riverside Sheriff's Department and the Hemet Police Department who were involved in the investigations and arrest. At the conclusion of the hearing, the trial court found probable cause for the arrest of Redd and Mosley and denied the motions.

a. Legal Principles

When a trial court rules on a motion to suppress under section 1538.5, the court must first determine the historical facts surrounding the action taken by the police. The trial court applies the appropriate Fourth Amendment principles to those facts to determine whether the defendant's motion should be granted. We accept the factual determinations of the trial court if they are supported by substantial evidence. We exercise our independent judgment on the question of whether, given the historical facts, the search or seizure was reasonable. (*People v. Brown* (2015) 61 Cal.4th 968, 975.)

A police officer may arrest a person when the officer has probable cause to believe the person has committed a specific crime. (§ 836, subd. (a)(3).⁵) "Probable cause exists

⁵ Section 836, subdivision (a)(3) states in part: "(a) A peace officer . . . without a warrant, may arrest a person whenever any of the following circumstances occur:

"[¶] . . . [¶]

"(3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed."

when the facts known to the arresting officer would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime. [Citation.]" (*People v. Celis* (2004) 33 Cal.4th 667, 673 (*Celis*).) "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts" (*Illinois v. Gates* (1983) 462 U.S. 213, 232 (*Gates*).) "It is incapable of precise definition. [Citation.] ' "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt," ' and that belief must be 'particularized with respect to the person to be . . . seized.' [Citation.]" (*Celis*, at p. 673.) Probable cause " 'means less than evidence which would justify condemnation It imports a seizure made under circumstances which warrant suspicion.' " (*In re J.G.* (2010) 188 Cal.App.4th 1501, 1505, quoting *Gates*, at p. 235.)

Probable cause is evaluated on the totality of the circumstances. (*Gates, supra*, 462 U.S. at pp. 230–231.) An officer must be able to point to specific and articulable facts from which he concluded that his action was necessary. He cannot rely on "unparticularized suspicions or 'hunches.' " (*People v. Lujano* (2014) 229 Cal.App.4th 175, 183 (*Lujano*).) We look at the totality of the objective evidence and the reasonable inferences that can be drawn therefrom. (*Ibid.*)

b. Testimony at Evidentiary Hearing

The facts leading up to the arrest are not in dispute. The crimes occurred within a span of six days and, as the trial court stated when ruling on the motion, all occurred within a small geographic area.

The officers who responded to the crimes testified to the victims' descriptions of the robbers. James G., Dorothy G., and William B. all said there were two robbers, both Black, in their early 20s. James G. and Dorothy G. said one man was taller than the other. He was close to six feet and about four inches taller than the other. The taller man had the gun. The men were neither very thin nor very fat, but the taller man was more slender than the shorter man. B.C. said he was robbed by only one man, who was Black and had a build similar to the taller man described by James G. and his mother. The robber held a gun to B.C.'s head. B.C. said the man was older, in the 35- to 40-year-old range.

James G. and William B. both said the men left in a dark-colored sedan. James G. said that the car had shiny rims. B.C. said that he noticed a white older model sedan that drove quickly away from the area after the robbery. Surveillance video from a neighbor of B.C., however, showed a Black male walking from B.C.'s house to a dark-colored compact car that had either dark-colored rims or no hubcaps. The next night, surveillance video from a grocery store showed a similar dark-colored car, the same size and shape as the car at the B.C. robbery, with dark rims or no hubcaps, closely follow Victor P. and Carmen L.'s car into a grocery parking lot, park in a secluded area with no one exiting the car, and follow the victim's car out of the parking lot within seconds. Photographs from the videos showed a small, dark, four-door sedan that was identified by a professional mechanic as a Toyota Yaris.

The arresting officer, Riverside County Sheriff's Sergeant Wallace Clear, had 25 years of policing experience. He looked for a Toyota Yaris in the area of Hemet and

San Jacinto. He saw only one. It was parked by a residence in San Jacinto in the same small area where all the robberies and the murder had occurred. A Black man of similar age and body build as the robbers got into the car and drove away. Sergeant Clear lost sight of the car for about an hour. There were three Black men of similar age and body build in the car when Sergeant Clear next saw the car. He asked Sergeant Robert Himmelberg to stop the men and obtain their identification.

The Yaris was empty when Sergeant Himmelberg saw it. He saw three Black men walking nearby, however. They were the only people in the vicinity. Sergeant Himmelberg asked the men if the car belonged to them. One of the men replied yes, and said they had car trouble. Sergeant Himmelberg detained the men.

Sergeant Clear arrived where the men were detained. He confirmed that they were the ones he had seen in the Yaris and matched the general age and physical descriptions given by the victims. He believed they were involved in the crimes and arrested them.

c. Analysis

Sergeant Clear arrested the men because he had a reasonable suspicion that they were responsible for the three robberies and the murder, based on the totality of the circumstances. He articulated specific, objective facts that informed his belief. (*Lujano*, *supra*, 229 Cal.App.4th at p. 183.) As noted, there were at least two robbers who participated in the crimes. All of the crimes were committed within a small geographic area. The vehicle that was caught on camera at two of the crimes scenes was very specific — a dark, four-door Toyota Yaris sedan with no hubcaps. The men were riding in a Yaris that matched the vehicle photographed at the two crime scenes. The men

matched the same general physical descriptions and age range of the robbers given by the victims. Sergeant Clear testified that he would not have arrested them if any of the men were substantially taller or shorter, heavier or thinner, younger or older than the descriptions given by the victims.

The third man arrested was not charged with the crimes, but that did not vitiate probable cause to arrest the three men. "The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested." (*Graham v. Connor* (1989) 490 U.S. 386, 396.) "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving." (*Id.* at pp. 396–397; see *People v. Perrusquia* (2007) 150 Cal.App.4th 228, 236, Bedsworth J., dissenting.) Sergeant Clear had three men at the side of the road, all of whom were associated with the Yaris and fit the description of the robbers. It was objectively reasonable for the officer to have a suspicion of guilt, particularized to these three men, based on articulated factors. (*Celis, supra*, 33 Cal.4th at p. 673; *Gates, supra*, 462 U.S. at pp. 231–232.)

Mosely and Redd argue that the descriptions of the men were too general, or "generic," to supply probable cause. However, the key was the connection of the men to a very specific car that matched the car present at the crimes. Generic descriptions of suspects have been found sufficient for probable cause to arrest when there was there is an articulable basis for suspicion in addition to the general descriptions. In *People v. Soun* (1995) 34 Cal.App.4th 1499 (*Soun*), for example, probable cause for arrest existed

when the descriptions of the six persons involved in the homicide matched the general ethnic appearance, clothing, ages, and statures of the eight men in a car that generally matched the descriptions of the car given by witnesses. (*Id.* at pp. 1525–1526.)

Similarly, in *In re Brian A.* (1985) 173 Cal.App.3d 1168, as here, the officer had generalized physical descriptions that could apply to a large number of people. The court concluded there was probable cause to arrest two people with the same combination of height, weight, sex, color, and relationship of height and weight, wearing clothing and carrying a duffle similar to that described by victims. (*Id.* at pp. 1173–1174.) The appellate court concluded the "probability of there being other groups of persons with the same combination of physical characteristics, clothing, and trappings is very slight." (*Id.* at p. 1174.) The three men arrested here had the same physical characteristics of the robbers and were using a very specific car. The dark, four-door Yaris sedan with no hubcaps, within a small geographic area, was a distinctive factor that, when added to the general factors, gave rise to probable cause to arrest. Thus, while many people fell within the generic descriptions of the men, the dark Yaris without hubcaps did not. Sergeant Clear did not rely on a "hunch" but on specific, objective, articulable facts. (*Lujano, supra*, 229 Cal.App.4th at p. 183.)

Applying our independent judgment to the undisputed facts, we conclude that Sergeant Clear had reasonable grounds for belief of guilt, particularized with respect to the defendants, based on articulable facts. In other words, he had probable cause to arrest. (*Celis, supra*, 33 Cal.4th at p. 673.)

2. *Firearm Enhancement*⁶

In a supplemental brief, Redd requests that we remand his conviction to permit the trial court to exercise its discretion to strike or dismiss the firearm enhancements that were imposed on his sentence. The trial court imposed three consecutive terms on the firearm enhancements: a term of 20 years on count 3 for personal discharge of a firearm (§ 12022.53, subd. (c)), and two terms of three years four months, one-third of the middle term, for personal use of a firearm (§ 12022.53, subd. (b)), on each of counts 4 and 5.

The enhancements were mandatory when the trial court imposed them on August 3, 2016. (§ 12022.53, former subd. (h), added by Stats. 2010, ch. 711, § 5, repealed by Stats 2017, ch. 682, § 2, eff. Jan 1, 2018.) The Legislature subsequently amended the law, effective January 1, 2018, to permit trial courts to exercise discretion and decide whether to impose, strike or dismiss the enhancements. (§ 12022.53, former subd. (h).) The Attorney General concedes, and we agree, that this ameliorative change in the law applies to Redd because his conviction was not final when the amendment was passed. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 506–507.)

DISPOSITION

We remand Redd's conviction to the trial court with the direction to exercise its discretion with respect to the firearm enhancements imposed on him. In all other respects we affirm the judgment.

⁶ The Attorney General asserts that the trial court erred in failing to sentence Redd on the firearm enhancement for count 6, personal discharge of a firearm causing death. (§ 12022.53, subd. (d).) The jury, however, did not find that firearm enhancement to be true.

BENKE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.